

LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA v.
ARULANANDA K MANICKAM

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[CIVIL APPEAL NO: 12BNCC-29-03-2014]
23 FEBRUARY 2017

CIVIL PROCEDURE: *Judgments and orders – Amendment – Application of – Payment of dividend or interest not stipulated in order – Whether order may be corrected by amendment – Rules of Court 2012, O. 20 r. 11 – ‘Slip rule’ – Whether applies to errors in expressing intention of court – Whether judge had directed mind to issue payment of dividend or interest – Whether respondent would suffer prejudice if order amended*

The appellant had, in 2011, instituted a writ action against, among others, the respondent, for unpaid EPF contributions in respect of the period of assessment between December 1997 and November 1998 in breach of the Employees Provident Fund Act 1991 (‘EPF Act’) for the amount of RM42,013 and for the outstanding dividend as well as interest on the said amount. After a full trial, the action was, on 8 February 2012, dismissed by the Sessions Court. The decision of the High Court Judge on 26 May 2014 in allowing the appeal, as contained in the order dated 26 May 2014 (‘the order’) only allowed the claim for the period between December 1997 and September 1998, which totaled a lower amount of RM38,158. There was no mention in the order of the respondent being liable to pay dividend or interest on the reduced amount. The appellant was of the view that the order should thus be amended to include the words ‘berserta dividen dan faedah yang dikira ke atas jumlah RM38,150 tersebut’, in order to truly reflect the intention of the decision in allowing the appeal, and which would also be consistent with the pleadings of the appellant in making the claim. Hence, the present application to amend the order *vide* encl. 21 pursuant to the slip rule found in O. 20 r. 11 of the Rules of Court 2012. The issue that arose for determination was whether the amendments proposed by the appellant could come within the ambit of the slip rule.

Held (dismissing encl. 21 with costs):

- (1) The order was quite specific in stating the amount to be paid by the respondent. The High Court Judge had clearly examined the amount being claimed as pleaded and even reduced slightly the amount of claim to be paid by the respondent and specifying the same to be RM38,158. The statement of claim itself contained detailed items sought to be recovered by the plaintiff. The order also crucially mentions the words ‘dibenarkan setakat’ in respect of the appeal. This showed a deliberate decision after a careful judicial analysis of the evidence. Further, even

- A costs of RM2,000 was specified in the order. But, crucially, not the dividend and interest. In addition, the statement of claim had included extensively drafted prayers for dividend and interests. Thus, it was likely that the issue must have been drawn to the attention of the court then. However, they were not reflected in the order at all. It could not
- B validly be concluded that if the matter had been considered by the judge, dividend and interest would definitely have been awarded. (paras 23 & 24)
- (2) The non-inclusion of the dividend and interest payment in the order was material and could have been the deliberate decision of the High Court in allowing the appeal. Thus, inclusion of the same at this stage would constitute a major variation of a fundamental nature. It was neither a clerical error and nor could it have been an accidental omission. The proposed amendment did not further the ends of justice. This was quite clear, since the respondent, from not having to pay any dividend and interest based on the order, and having been led to believe that to be the position, was required by the appellant, after two years, to pay dividend and interests on the amount of RM38,158. (para 27)
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- (3) The appellant's argument that there was no prejudice to the respondent since they were bound to pay the same under the EPF Act was not tenable because if that was true then the applicant could just rely on the EPF Act to demand such payment of dividend and interest. The fact was it was not mentioned in the order and the appellant obviously sought to rely on the order for enforcement. It was material that it should be mentioned in the order. But it was not. The omission, if indeed it was
- E one, was not in any way accidental or clerical in nature. It was much more substantive and fundamental and went beyond the jurisdictional scope of the slip rule under O. 20 r. 11 of the ROC. (paras 28 & 29)
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Case(s) referred to:

- Affin Bank Bhd v. WT Low & Ng Realty Sdn Bhd* [2003] 1 CLJ 674 HC (*refd*)
- G *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 FC (*refd*)
- Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92 FC (*refd*)
- HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal* [2004] 3 CLJ 121 CA (*refd*)
- Ling Nam Rubber Works v. Leong Bee & Company (No 2)* [1968] 1 LNS 73 HC (*refd*)
- H *Oriental Bank Bhd v. Sykt Zahidi Sdn Bhd* [1999] 1 CLJ 810 HC (*refd*)
- Sang Lee Company Sdn Bhd & Ors v. Munusamy Karupiah* [2010] 5 CLJ 229 FC (*refd*)
- Standard Chartered Bank Malaysia Bhd v. Benjamin KRK Samy & Anor* [2002] 1 CLJ 171 HC (*refd*)
- Tak Ming Co Ltd v. Yee Sang Metal Supplies Co* [1973] 1 All ER 569 (*refd*)
- Tiong Hung Ming v. Kalimantan Hardwood Sdn Bhd* [1994] 1 CLJ 412 HC (*refd*)
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Legislation referred to:

Rules of Court 2012, O. 20 r. 11, O. 42 r. 13

For the plaintiff - S Krishnan; M/s Azrul Afifi & Azuan

For the respondent - Nabilah Rusli; M/s Lakshmi Gandhi Nathan & Partner

Reported by Sandra Gabriel

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JUDGMENT**Mohd Nazlan Ghazali J:****Introduction**

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[1] This is an application by the appellant, documented in encl. 21, to amend the order granted by the High Court in allowing the appeal against the decision of the Sessions Court which had earlier dismissed the appellant's claim against the respondent.

[2] I dismissed the application following conclusion of the hearing on 23 August 2016. This judgment contains the full reasons for my decision.

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Background

[3] The appellant is the Employees Provident Fund Board. The appellant had, in 2011, instituted a writ action against, among others, the respondent, for outstanding and unpaid employer's contribution, in breach of the Employees Provident Fund Act 1991 ("EPF Act"). After a full trial, this action was, on 8 February 2012, dismissed by the Sessions Court. The High Court, however, on 26 May 2014 allowed the appeal by the appellant against the respondent.

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[4] The claim filed by the appellant at the Sessions Court was for payment of unpaid EPF contributions in respect of the period of assessment between December 1997 and November 1998 for the amount of RM42,013 and for the outstanding dividend as well as interest on the said amount.

[5] The decision of the judge of this High Court NCC1 (who has since been transferred to another division) in allowing the appeal, as contained in the order dated 26 May 2014 ("the order") only allowed the claim for the period between December 1997 and September 1998, which totaled a lower amount of RM38,158. There is, in addition, however, no mention in the order of the respondent being liable to pay dividend or interest on the reduced amount. No grounds of judgment had been issued in respect of the decision contained in the order.

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- A [6] The appellant takes the view that the order should thus be amended to include the words “berserta dividen dan faedah yang dikira ke atas jumlah RM38,158 tersebut”, in order to truly reflect the intention of the decision in allowing the appeal, and which would also be consistent with the pleadings of the appellant in making the claim. Hence the present application, which was filed on 31 May 2016.
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Basis Of Application

- C [7] The application to amend the order by the proposed inclusion of the words “berserta dividen dan faedah yang dikenakan ke atas jumlah RM38,158 tersebut” is based, by the appellant, on the so-called slip rule found in O. 20 r. 11 of the Rules of Court 2012.

- D [8] The resistance by the respondent against the application, on the other hand, is premised on the principal ground that as the order had been perfected, and leave to appeal to the Court of Appeal subsequently denied on 15 August 2016, the court is now already *functus officio*. In addition, the respondent contended that this application was also not made in adherence to O. 42 r. 13 of the Rules of Court 2012, and that the same is thus an abuse of the process of the court.

Evaluation And Findings of This Court

- E [9] The slip rule is encapsulated in O. 20 r. 11 of the Rules of Court 2012 (“the RC 2012”) which states:

Clerical mistakes in judgment or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by a notice of application without an appeal.

- F [10] Therefore, once an order has been made, entered and perfected, the court has no jurisdiction to amend the order unless there has been an accidental slip in drawing up the order, or unless the order as drafted does not correctly state what the court actually decided and intended (see *Affin Bank Bhd v. W T Low & Ng Realty Sdn Bhd* [2003] 1 CLJ 674; [2003] 2 AMR 417). In *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143, Chang Min Tat FJ, delivering the judgment of the Federal Court stated:
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- H Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in Order 28 rule 11 Rules of the Supreme Court 1957 (Order 20 rule 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: *Re St Nazaire Co* 12 Ch D 88, *Kelsey v. Doune* [1912] 2 KB 482; *Hession v. Jones* [1914] 2 KB 421, unless it is a judgment by default or made in the absence of a party at the trial or hearing. But
- I if a judgment or order has been obtained by fraud or where further

evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong v. Neotia & Co* [1918] AC 888 and *Jonesco v. Beard* [1930] AC 298.

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[11] The slip rule can be invoked where the formal judgment does not accord with the oral decision pronounced by the court earlier in time or where matters intended to be included in the judgment were accidentally overlooked.

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[12] For proper context, I should at the start make clear that reliance on the application of slip rule by the appellant means that the arguments of the respondent on the significance of the Federal Court decision of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 which sets out circumstances under which a consent order could be varied is not relevant. These circumstances are mutually exclusive to the situations that could attract the application of the slip rule.

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[13] Nor is the argument about the court being *functus officio* relevant either (see the Federal Court decision in *Sang Lee Company Sdn Bhd & Ors v. Munusamy Karuppiah* [2010] 5 CLJ 229 and the High Court case of *Standard Chartered Bank Malaysia Bhd v. Benjamin KRK Samy & Anor* [2002] 1 CLJ 171). I should also add that O. 42 r. 13 providing for any application to set aside or vary an order to be made within one month after receipt of order too is not applicable in a slip rule situation. Nor can the issue of *res judicata* be raised to defeat an application like presently.

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[14] And this is precisely because matters that can be amended or corrected under O. 20 r. 11 are merely clerical mistakes, and errors arising from accidental slips or omissions. Thus to such extent, the grounds proffered by the respondent to resist this instant application are entirely unmeritorious because they are irrelevant.

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[15] Therefore, the question for this court is to determine the single issue whether the amendments proposed by the appellant could come within the ambit of the slip rule. I do not think it is disputed that what was sought to be rectified in the instant application did not arise from a clerical mistake and as a result, it is incumbent upon the appellant to establish that there had been an accidental slip or omission to justify O. 20 r. 11 to be invoked.

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[16] The defect or omission must be an error in expressing the manifest intention of the court at the time the order was drawn up. There is no jurisdiction under the slip rule to amend even a manifestly erroneous order made by the court where the court's attention was drawn to a particular point and it had applied its mind to that issue (see *Ling Nam Rubber Works v. Leong Bee & Company (No. 2)* [1968] 1 LNS 73; [1968] 1 MLJ 265).

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A [17] The order in the instant case is a decision against the judgment of the Sessions Court dismissing the claim by the appellant (as the plaintiff) after full trial. The High Court Judge, as per the order, allowed the appeal. The issue is whether it is correct, as contended by the appellant, that the non-reference to the payment of dividend and interest in the order is an
B accidental omission under the slip rule. The appellant argued further that under the EPF Act, non-payment of contribution would also carry the obligation to pay dividend and interests. The pleadings of the appellant at the Sessions Court had also set out the claim for dividend and interests.

C [18] The crucial determinant in rectifications grounded on the slip rule has been discussed in a number of authorities. I shall refer only to two. In *Oriental Bank Bhd v. Sykt Zahidi Sdn Bhd* [1999] 1 CLJ 810, the High Court held:

D I have to ask myself whether the omission to include a specific date in an application for an order for sale was due to a mistaken appreciation of the evidence or of the law or whether it was due to an accidental slip or omission. In *Armitage v. Parsons* [1908] 2 KB 410, the plaintiff signed a judgment in default of appearance by the defendant. However, due to a slip up of his solicitors' clerk, the plaintiff included in the sum in respect of which judgment was signed, costs on too high a scale, so that the judgment was signed for a sum which was too high. The Court of Appeal
E held, by a majority, that the defendant was not entitled to have the judgment set aside, but that the judgment should be amended under the slip rule. It is important therefore in considering the request to amend or correct the earlier order that the court must give effect to the intention of the court at the time when the earlier order was made. In this case the error arose out of counsel's omission to ask for a specific date although
F he had prayed for an order that a date be set not less than one month from the date the order for sale was made. This brings to mind the case of *Re Inchcape* [1942] 2 All ER 157 where the court allowed an application to include costs not asked for in the order. The court held that the error arose from an omission of counsel to direct the judge's attention to those costs which would have been included if the learned judge's attention had
G been so directed. The application was allowed under the slip rule. *There is no doubt that if a judge is addressed on a particular issue and having directed his mind to that issue, he decides upon it, there can certainly be no alteration under this slip rule, even if the learned judge had fallen into an obvious error in principle. The omission here is because the judge was not asked for a specific date and the judge did not direct his mind to that issue. Clearly therefore I can and ought to allow the application to amend the order under the slip rule.* (emphasis added)
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I [19] The other is the decision in *Tiong Hung Ming v. Kalimantan Hardwood Sdn Bhd* [1994] 1 CLJ 412, a case, not unlike presently, involving an omission to grant interest where the High Court applied the Privy Council decision in *Tak Ming Co. Ltd. v. Yee Sang Metal Supplies Co.* [1973] 1 All ER 569. In allowing the application under the slip rule, Steve Shim J (as he then was) held that:

Taking the cue from Pickering J I have to state that in the instant case, my mind was primarily drawn to the lengthy arguments and submissions of Counsel for the parties concerned which had concentrated essentially on matters other than on interest. Not unnaturally therefore my judgment was confined to the issues canvassed before me. **Nevertheless, had the matter of interest been raised by Dr. Chew at the time I delivered judgment, I would have granted it.** In the circumstances and having regard to O. 42 r. 12, I will allow this application and order that the judgment dated 15 May 1993 be amended to include an award of interest on the judgment sum at rate of 8% per annum from date of judgment until it is satisfied. There will be no order as to cost on this application.

(emphasis added)

[20] In order to deal with the pivotal issue of whether if the judge had considered the issue, the award for dividend and interest would have, as a result, been made, I accept that even though not raised by the appellant, there is no evidence that the learned judge in her decision as documented in the order had actually refused the award for dividends and interests on the judgment sum.

[21] But this alone could not be taken to suggest that if it had been considered the award would have been granted. It was simply not referred to in the order. Nor are the grounds of judgment available, as mentioned earlier. The order itself palpably does not show either way, or whether the matter on dividend and interest was even raised by counsel.

[22] In my view, upon a close examination of the order, and other relevant documents such as the statement of claim of the appellant at the Sessions Court, it is not clear, given the omission, what the exact intention of the court was in respect of the liability to pay dividend and interest. At any rate, I cannot accept the submission of the respondent's counsel at the hearing before me that the High Court had considered and rejected such payment since that is disputed by the appellant's counsel. I find no basis to the argument that if the judge then had considered the issue, dividend and interest would have been awarded. This would be a matter that the judge must have considered after having evaluated the evidence in the record of appeal in this particular case. I should add for clarity that it is not necessary for the power to amend under O. 20 r. 11 be exercisable only by the judge who heard the matter and made the order which is sought to be amended (see the Court of Appeal decision in *Sang Lee Company Sdn Bhd & Ors v. Munusamy Karuppiah* [2010] 5 CLJ 229).

[23] However, the order was quite specific in stating the amount to be paid by the respondent. The High Court Judge had clearly examined the amount being claimed as pleaded and even reduced slightly the amount of claim to be paid by the respondent and specifying the same to be RM38,158. The

A statement of claim itself contained detailed items sought to be recovered by the plaintiff. The order also crucially mentions the words “dibenarkan setakat” in respect of the appeal. This shows a deliberate decision after a careful judicial analysis of the evidence.

B [24] Further, even costs of RM2,000 was specified in the order. But, crucially, not the dividend and interest. In addition, it bears repetition that the statement of claim had included extensively drafted prayers for dividend and interests. Thus it is not unlikely that the issue must have been drawn to the attention of the court then. However, they are not reflected in the order at all. In my judgment, it cannot validly be concluded that if the matter had been considered by the judge, dividend and interest would definitely have been awarded.

C [25] Furthermore, whilst it is not disputed that undue delay is not in itself a ground for refusing to correct a judgment under the slip rule (see *HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal* [2004] 3 CLJ 121; [2004] 4 MLJ 398 and *Tak Ming Co v. Yee Sang Metal Supplies Co* [1973] 1 WLR 300), it is a factor to be considered nevertheless, and more so in the instant case, since the delay was for about two years, given that it was only initiated on 31 May 2016 when the appellant could have made the application at the time of the perfection of the order (dated 26 May 2014) itself. In any event as is standard, the appellant’s counsel must have agreed to the language and content of the order prior to the perfection of the same.

E [26] In my view, under such circumstances, appropriate and due regard ought also to be had to the rights of the respondent to know at the time of the perfection of the order the extent of his liability to the appellant. The delay in the instant case is nothing but inordinate.

F [27] The non-inclusion of the dividend and interest payment in the order is material and could have been the deliberate decision of the High Court in allowing the appeal. Thus, inclusion of the same at this stage would constitute a major variation of a fundamental nature. It is neither a clerical error and nor could it have been an accidental omission. I would also not characterise the proposed amendment as one which would further the ends of justice. This is quite clear, since the respondent, from not having to pay any dividend and interest based on the order, and having been led to believe that to be the position, is now required by the appellant, after two years, to pay dividend and interests on the amount of RM38,158.

G [28] The appellant’s argument that there is no prejudice to the respondent since they are bound to pay the same under the EPF Act is not tenable because if that is true, then the applicant could just rely on the EPF Act to demand such payment of dividend and interest. The fact is it is not

mentioned in the order and the appellant obviously seeks to rely on the order for enforcement. It is material that it should be mentioned in the order. But it is not.

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Conclusion

[29] In view of the foregoing reasons, I am not satisfied, on a balance of probabilities, that the appellant has proven its case for this court to invoke the slip rule under O. 20 r. 11 (or pursuant to the inherent jurisdiction of the court for that matter), and effect the proposed amendments. It is not clear that the High Court Judge, when making the order, had intended to impose payment of dividend and interests given the circumstances I referred to earlier. The omission, if indeed it was one, was not in any way accidental or clerical in nature. It is much more substantive and fundamental and in my view goes beyond the jurisdictional scope of the slip rule under O. 20 r. 11.

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[30] Accordingly, I dismiss the application in encl. 21, with costs.

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